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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GEORGE L. KARAPINKA,

Petitioner

vs.

UNION CARBIDE CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

GEORGE L. KARAPINKA
Petitioner pro se
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QUESTIONS PRESENTED

I. Whether the district court and the court of appeals can deprive the plaintiff of the summary judgment hearing after the plaintiff had filed sworn testimony and the motion, and after he had requested oral argument from the district court in writting.

II. Whether the court of appeals can dismiss an appeal on the basis of the actions taken by the district court after the notice of appeal was filed.

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Petitioner pro se prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in dismissing petitioner's appeal on June 25, 1982, and to review the proceedings in the U.S. District Court for the District of New Jersey before the notice of appeal was filed.

CITATIONS TO OPINIONS BELOW

The U.S. Court of Appeals for the Third Circuit, Chief Judge Seitz, dismissed petitioner's appeal with the Order of June 25, 1982, a copy of which is anexed hereto as a-1*. The motion to supply the petitioner with the Court's opinion was denied by Chief Judge Seitz August 23, 1982 (a-2,3).

JURISDICTION

Petitioner's appeal was dismissed by the U.S. Court of Appeals for the Third Circuit June 25, 1982. Petition for Rehearing

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* References preceded by "a" refer to the Appendix below; "A" to the Appendix to Appellant's Brief.

was denied July 21, 1982. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

STATEMENT OF THE CASE

The complaint charging Union Carbide Corporation, the respondent, with the violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e-5) in dismissing petitioner from his position of Research Scientist, was filed May 6, 1981. This complaint was amended with petitioner's sworn complaint (A-7 to 10) July 13, 1981. Petitioner pro se is seeking reinstatement to his former position with back pay and with back benefits, and demages in excess of $10,000.

The respondent answered with motion to dismiss or for summary judgment (A-12), supported by the Affidavit of Karen W. Readshaw (A-13). The petitioner then filed Affidavit of George L. Karapinka and Plaintiff's Notice of Opposition of Defendant's Motion (A-38). Motion to Dismiss Defendant's Motion (A-42), the counter motion for summary

judgment in petitioner's favor, was filed September 21, 1981. By the letter of Judge Dickinson R. Debevoise, dated September 22, 1981 (A-44), the petitioner was informed that the respondent will withdraw his summary judgment motion. On the scheduled argument day (October 5, 1981) for the respondent's summary judgment motion Judge Debevoise ruled that the respondent's motion has been withdrawn (A-66). There was no formal withdrawal by the respondent of it's motion for summary judgment. October 5, 1981 the petitioner filed his Petition to Hear the Argument on the Motion (a-4), requesting Judge Debevoise for the oral argument on his summary judgment counter motion. This petition was never granted, it was ignored. Petitioner's Motion for Judgment by Default, charging respondent that it filed motion for summary judgment for the purpose of delay, was filed September 28, 1981; the argument on this motion was held October 19, 1981. No other motions were argued on that day.

Judge Debevoise by his ruling October 19, 1981 denied petitioner's Motion for Judgment by Default.

October 23, 1981 respondent's motion to compel petitioner to appear for deposition and for costs and attorney's fees, was filed.

October 29, 1981 petitioner's motion for re-argument of the summary judgment counter claims (A-60), actually for argument since there was no previous argument on these counter claims, was filed. This motion was filed because of the respondent's motion to compel petitioner to appear for deposition (supra).

October 30, 1981 petitioner filed his Notice of Appeal, appealing District Court's ruling on summary judgment on October 5,1981 and on judgment by default* on October 19, 1981.

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* At that time petitioner pro se was not aware of the fact that rulings on judgment by default are not appealable. No futher reference to this ruling will be made in this petition.

In his pleadings in the Court of Appeals petitioner described in detail, with appropriate documentation, the proceedings in the District Court. He established the point that the ruling of the District Court was final, as defined by this Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-547 and in Gillespie v. U.S. Steel, 379 U.S. 148, 152-154, and therefore appealable. In Appellant's Brief the petitioner requested the Court of Appeals to pass the summary judgment on the basis of the evidence presented to the District Court.

With the appellee's brief the respondent filed the motion to file as part of its Supplemental Appendix documents filed in the District Court after the notice of appeal had been filed, and to strike pages 58, 59, 59a from the Appendix. These pages contained the statement read by the petitioner into the record October 19, 1981. This statement on transcription by the reporter was made unintelligeble. Petitioner therefore incorpo-

rated this statement verbatim into the Appendix. Petitioner filed his motion to strike all the references to the documents contained in respondent's Supplemental Appendix, the basis being the fact that this appeal was filed according to 28 U.S.C. Sec. 1291. Under this statute only the documents filed in the district court before the notice of appeal had been filed, constitute the record on appeal.

In response to the letter from the Clerk of the Court of Appeals for the Third Circuit advising the petitioner that his appeal will be submitted on briefs with no oral argument, petitioner moved for oral argument. This motion was denied June 24, 1981 by the Order of Chief Judge Seitz.

By the Order of Chief Judge Seitz the appeal was dismissed for want of an appealable order on June 25, 1982. In the same Order respondent's motion for leave to file supplemental appendix and to strike pages A-58, A-59, A-59a of appellant's appendix was

granted, and petitioner's motion to strike appellee's supplemental appendix was denied. No opinion was attached.

Petition for rehearing was timely filed. It contained the Affidavit of George L. Karapinka which stated among other facts, that the petitioner's income in 1981 had been $6,238 (similar income expected in 1982) and his 3-month medical insurance premium had been $290. After petitioner's last medical examination August 17, 1982 this premium was raised to $362. By the Order of Chief Judge Seitz the petition for rehearing was denied July 21, 1982.

August 5, 1982 petitioner moved for the opinion on which the order dismissing the appeal was based. By the Order of Chief Judge Seitz, dated August 23, 1982, this motion was denied (a-2,3).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has decided important questions on summary judgment hearing and on the effect of District Court's actions on the appeal, actions performed by District Court after the notice of appeal had been filed; and because its decision conflicts with the applicable decisions of this Court.

I. THE DISTRICT COURT AND THE COURT OF APPEALS DEPRIVED THE PLAINTIFF OF SUMMARY JUDGMENT HEARING AFTER THE PLAINTIFF HAD FILED SWORN TESTIMONY AND THE MOTION, AND AFTER HE HAD REQUESTED ORAL ARGUMENT IN WRITTING FROM THE DISTRICT COURT

Federal Rules of Civil Procedure (FRCP) as stated in Rule 1:"shall be construed to secure the just, speedy, and inexpensive determination of every action". Rule 56 outlines the procedure for summary judgment as one of the convenient means for the just, speedy and inexpensive determination of an action. Rule 56 of FRCP makes it clear that every litigant is entitled to summary judgment hearing, spetially after the litigant

has requested such ahearing in writting (Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964).

The petitioner filed sworn testimony in the form of Amended Sworn Complaint (A-7 to 10) and the Affidavit of George L. Karapinka (A-27). No sworn testimony was furnished by the respondent. The irrelavant Affidavit of Karen W. Readshaw (A-13), according to the respondent (Brief of Defendant-Appellee p.4,5,6) and according to the District Court (A-66), was withdrawn. Then the petitioner expressed in a clear but possibly in a procedurally not usual way (see Conley v. v. Gibson, 355 U.S. 41, at 48) his desire and his right to summary judgment hearing; first in filing September 21, 1981 his Motion to Dismiss the Defendant's Motion (A-42), then in the Petition to Hear the Argument on the Motion filed October 5, 1981 (a-4, see also Petition for Rehearing). All the prerequisits for the summary judgment hearing, according to Rule 56 of FRCP, were be-

fore the District Court. The District Court ignored them.

The petitioner in his pleadings to the Court of Appeals (Appellant's Brief, Reply Brief, Petition for Rehearing) have made it clear that the finality of the District Court's Order, and hence it's appealability were defined in the rulings of this Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-547 and in Gillespie v. U.S. Steel, 379 U.S. 148, 152-154. The denial of the summary judgment hearing by the District Court fits very well into the definition of finality, under 28 U.S.C. Sec. 1291, as defined by this Court in Cohen. In Gillespie and references therein this Court ruled that if the ruling of the district court may result in denying the justice than this ruling is appealable under 28 U.S.C. sec. 129. This ruling is very applicable to the petitioner's case. The District Court was aware of the fact that the petitioner undervent open heart surgery to replace his aortic valve (A-8) and that the prolonged trial would

place extraordinary strain on his health and on his finances. See the Petition for Rehearing page 4 and Affidavit of George L. Karapinka therein.

The respondent, by filing on October 23, 1981 it's motion to compel petitioner to appear for deposition, intended to deprive the petitioner of summary judgment opportunity; see Woods v. Robb, 171 F.2d 539 (5th Cir. 1948) where the discovery process had invalidated plaintiff's summary judgment opportunity.

The District Court by not granting the summary judgment hearing and the Court of Appeals by dismissing petitioner's appeal are permitting health resources, time and money to be irreparably lost. They are also denying justice to the petitioner according to Gillespie.

II. THE COURT OF APPEALS DISMISSED THE APPEAL ON THE BASIS OF THE ACTION TAKEN BY THE DISTRICT COURT AFTER THE NOTICE OF APPEAL HAD BEEN FILED

The courts of the United States hold

that the filing of the notice of appeal transfers the jurisdiction over the case to the court of appeals. This position of the courts is summarized in 9 Moores Federal Practice, 2nd ed., 203.11:

"The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. ... Thus after the notice of appeal is timely filed, the district court has no power ... to allow the filing of amended or supplemental pleadings or otherwise reexamine the order from which the appeal is pending." (Emphasis added)

In the petitioner's case the action in the District Court should have been stopped because, as shown above, the denial of the summary judgment hearing was the final ruling of the District Court in light of this Court's decisions in Cohen and Gillespie, supra. However, the main question under consideration here is whether the action in the District Court for the District of New Jersey consisting of filing of the documents of amended and supplemental nature, having a direct effect on the appeal, in the District

Court after October 30, 1981 the date of the notice of appeal, can be used by the Court of Appeals as the basis on which to dismiss the appeal. These documents were allowed into the record on appeal by the Court of Appeals by granting the respondent's motion on June 25, 1982 for leave to file Supplemental Appendix containing: 1. Letter of Edward P. Lynch to the Hon. Dickinson R. Debevoise; totally irrelavant to the appeal. 2. Answer; which the petitioner was ordered orally by Judge Debevoise to accept November 16, 1981. (Notice of appeal was filed October 30, 1981). 3. District Court's Order filed November 2, 1981. 4. Statement in Opposition to Motion for Re-Argument filed November 4, 1981. 5. Letter from Judge Debevoise to G.L. Karapinka and E.P. Lynch filed November 5, 1981. 6. Order of Judge Debevoise filed November 5, 1981. 7. Order of Judge Debevoise filed November 9, 1981.

These documents must have constituted the basis for the dismissal of the appeal.

In the absence of the Court of Appeals' opinion (a-3) no other conclusion is possible.

The Order of the Court of Appeals dismissing petitioner's appeal (a-1) states that the appeal was submitted under Third Circuit Rule 12(6). This Rule states:

"Criteria for determining whether there should or should not be oral argument:
(1) whether the appeal is frivolous, or
(2) whether the dispositive issue or set of issues has been recently authoritatively decided, or
(3) whether the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

In his motion for the oral argument before the Court of Appeals, which was denied June 24, 1982, petitioner stated that he did not feel that he stated his case adequately in his briefs. Therefore the Court of Appeals did not consider Item (3) to be relavant to it's decision. No dispositive issue was decided recently; so Item (2) of Rule 12(6) is not relavant. That leaves Item (1) as the only relevant item. All of the petitioner's pleadings show that the appeal is not frivo-

lous, and such a conclusion of the Court of Appeals is very erroneus, and prejudicious to the petitioner.

CONCLUSION

The District Court violated Rule 56 of FRCP by not granting summary judgment hearing after sworn testimony, the motion, and the petition to hear the argument on the motion were filed in the District Court.

The actions of the U.S. Court of Appeals for the Third Circuit and of the U.S. District Court for the District of New Jersey brought to the attention of this Court in this petition are a departure from the accepted course of the judicial procedure. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: October 11, 1982.

Respectfully submitted,

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